

AFFELD GRIVAKES LLP
David W. Affeld (SBN 123922)
dwa@agzlaw.com
2049 Century Park East, Suite 2460
Los Angeles, California 90067
Telephone: (310) 979-8700
Facsimile: (310) 979-8701

Attorneys for Plaintiff Michael Zeleny

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

MICHAEL ZELNY, an individual,
Plaintiff,

v.

EDMUND G. BROWN, JR., an individual,
in his official capacity; XAVIER
BECERRA, an individual, in his official
capacity; CITY OF MENLO PARK, a
municipal corporation; and DAVE
BERTINI, an individual, in his official
capacity; NEW ENTERPRISE
ASSOCIATES, INC., a Delaware
corporation

Defendants.

CASE NO.: CV 17-7357 JCS

**CORRECTED FIRST AMENDED
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

DEMAND FOR JURY TRIAL

Plaintiff Michael Zeleny alleges as follows:

INTRODUCTION

1. This case is brought to challenge the constitutionality of California statutes restricting Plaintiff's rights to bear arms under the Second Amendment while engaging in, and as part of, entertainment events and media productions of peaceful, public speech on matters of public concern or matters of political, social, or other concerns to the community, or issues of significant importance to the public as a whole, as protected by the First Amendment. This case

1 also challenges the application, by the City of Menlo Park (the “City”), of California statutes
 2 restricting Plaintiff’s rights to bear arms under the Second Amendment while engaging in, and as
 3 part of, entertainment events and media productions of peaceful, public speech on matters of
 4 public concern or matters of political, social, or other concerns to the community, or issues of
 5 significant importance to the public as a whole, as protected by the First Amendment. Lastly, this
 6 case challenges state statutes and municipal policies that have been seized upon by the City, which
 7 has imposed unlawful, content-based prior restraints, backed by the threat of criminal prosecution,
 8 to stifle Plaintiff’s Constitutionally protected speech.

9 2. Plaintiff Michael Zeleny (“Zeleny” or “Plaintiff”) has been making lawful
 10 public protests in an effort to expose grave wrongdoing by a prominent Silicon Valley executive,
 11 Min Zhu, and those individuals and entities who have willingly continued to do business with Min
 12 Zhu despite knowing about his misconduct. Min Zhu’s cohorts include New Enterprise
 13 Associates, Inc. (“NEA”), present and former members of NEA’s senior management, WebEx
 14 Communications, Inc. (“WebEx”), and present and former members of its senior management.
 15 The point of Zeleny’s protests is to express the view that Min Zhu’s wrongdoing, and the conduct
 16 of NEA and WebEx senior management in turning a blind eye to it, should disqualify them from
 17 any involvement in publicly traded companies.

18 3. Zeleny’s protests have sought to publicize allegations that Min Zhu
 19 repeatedly raped his daughter Erin Zhu when she was 14 years old. Other Silicon Valley
 20 executives and investors, including NEA, WebEx, and their senior management, became aware of
 21 Min Zhu’s incestuous, pedophilic assaults, but have nevertheless continued to do business with
 22 him. Zeleny has been protesting to expose Min Zhu’s despicable conduct and the corruption of
 23 Min Zhu’s cohorts for condoning it.

24 4. To amplify his message, Zeleny previously conducted protests at which he
 25 lawfully carried unloaded firearms. Zeleny also used simulated, non-explicit images and videos of
 26 Min Zhu’s heinous conduct. In compliance with entertainment event and film and video
 27 production exemptions to recently enacted California bans on the carrying of unloaded firearms,
 28

1 Zeleny has created, and intends to continue creating, multimedia video and live entertainment
2 events to disseminate his message.

3 5. The targets of Zeleny's protests have attempted to sweep Min Zhu's
4 misdeeds and NEA's and WebEx's knowledge of them under the rug. They have enlisted the help
5 of local law enforcement to suppress Zeleny's speech. In 2012, they responded to Zeleny's
6 protests by having him arrested and criminally prosecuted for supposed violations of California
7 open and/or concealed carry laws. Zeleny was acquitted after a bench trial.

8 6. Despite having failed in the earlier prosecution, the City continues to
9 threaten further prosecution if Zeleny resumes his protests. The City asserts that Zeleny is
10 required to have a permit from the City for his events in order to qualify for state law exemptions
11 to the firearm carry ban. Yet, the City refuses to grant Zeleny a permit for his entertainment
12 events, even though he is willing to comply with lawful time, place, and manner restrictions.
13 Indeed, the City refuses even to advise Zeleny *what the requirements are* for seeking a permit.
14 Instead, the City has made clear that it will not grant Zeleny a permit because it considers his
15 message offensive, and that if he continues his protests, the City will prosecute him for violating
16 California's obscenity laws and its open and/or concealed carry statutes.

17 7. Zeleny files this action to seek a declaration that the California statutes
18 invoked against him are unconstitutional. Zeleny also seeks a declaration that the California
19 statutes as applied against him by the City are unconstitutional. Zeleny contends that the People of
20 the State of California and the Menlo Park Police Department have violated and threaten further
21 violation of Zeleny's rights under the First, Second, and Fourteenth Amendments to the United
22 States Constitution and provisions of the California State Constitution. Furthermore, Zeleny's
23 exercise of his Constitutional rights arises in connection with a public issue or an issue of public
24 interest. Thus Zeleny sues under 42 U.S.C. § 1983 for violation of his civil rights.

25 8. Zeleny challenges the facial validity of California statutes restricting the
26 public display of unloaded firearms, California Penal Code §§ 26400 and 26350. Plaintiff also
27 challenges the interpretation of California Penal Code §§ 25510, 26400, 26405, 26350, and 26375
28 by local authorities in the City of Menlo Park, as applied to Plaintiff under the particular

circumstances of this case, and to the City's adoption and enforcement of municipal policy as content-based restrictions on his protected speech.

JURISDICTION AND VENUE

9. This action arises under the United States Constitution, particularly the First, Second, and Fourteenth Amendments, and the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988.

10. This Court has original jurisdiction over these federal claims pursuant to 28 U.S.C. §§ 1331 and 1343.

11. This Court has authority to grant the requested declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57.

12. This Court has authority to issue the requested injunctive relief pursuant to 42 U.S.C. § 1983 and Federal Rule of Civil Procedure 65.

13. This Court has authority to award attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

14. This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367(a), and it is authorized to award attorneys' fees and costs pursuant to Cal. Code Civ. Proc. § 1021.5.

15. Each of Defendant's unlawful acts alleged herein occurred in the State of California and within the Northern District of California.

16. Venue is proper in the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1391(b) because the events giving rise to the instant action occurred in Menlo Park, California.

THE PARTIES

17. Zeleny is a citizen and resident of Los Angeles, California. Zeleny is an internationally renowned researcher of the history and technology of firearms, and a holder of a California Certificate of Eligibility (COE), which certifies that the California Department of Justice (DOJ) has checked its records and determined that he is not prohibited from acquiring or possessing firearms at the time the firearms eligibility criminal background check was performed.

1 A COE is a prerequisite licensing/permit requirement for all prospective licensed firearms dealers,
2 licensed ammunition vendors, manufacturers, certified instructors, gun show promoters, explosive
3 permit holders, and other firearm-related employment activities, including any agent or employee
4 of a vendor who handles, sells, or delivers firearms and ammunition. Zeleny has never been
5 convicted of a felony or misdemeanor offense.

6 18. Defendant Xavier Becerra (hereinafter “Becerra”) is the Attorney General of
7 the State of California. Plaintiff is informed and believes, and on that basis alleges, that Becerra is
8 a citizen and resident of the State of California.

9 19. Defendant City of Menlo Park (hereinafter “City”) is a municipal
10 corporation duly organized and existing under the laws of the State of California and located
11 within the Northern District of California.

12 20. Defendant Dave Bertini (hereinafter “Bertini”) is and was at all relevant
13 times the Commander of the Menlo Park Police Department. He committed the acts complained
14 of herein while acting in his official capacity as Police Commander. Plaintiff is informed and
15 believes, and on that basis alleges, that Bertini is a citizen and resident of the state of California
16 and the Northern District of California.

17 21. In all of their actions and omissions alleged below, the foregoing
18 Defendants were acting under color of state law and are being sued in their official capacities
19 pursuant to *Ex Parte Young*, 209 U.S. 123 (1908).

20 22. Defendant New Enterprise Associates, Inc. (hereinafter, “NEA”) is a
21 Delaware corporation with its principal place of business in Menlo Park, California. NEA bills
22 itself as the largest and most prominent venture capital firm in the world.

23 23. At all relevant times alleged herein, Defendant NEA conspired with
24 defendants City and Bertini for the purpose of violating Zeleny’s constitutional rights under the
25 First, Second, and Fourteenth Amendments to the United States Constitution.

FACTS

Min Zhu's Heinous Conduct

24. Min Zhu was a prominent Silicon Valley executive who worked in the high-tech industry in California from the late 1980's until May 2005. He was a founder, President, and Chief Technology Officer of WebEx, an Internet technology company that became publicly traded on NASDAQ in 2000.

25. Plaintiff is informed and believes, and on that basis alleges, that since May 2005, Min Zhu has continued to work in the high-tech industry based out of the People's Republic of China, and that Silicon Valley executives, including current and former NEA senior management, continue to fund him and collaborate with him in his ventures.

26. Plaintiff is informed and believes, and on that basis alleges, that in or about August and September of 1988, Min Zhu repeatedly raped his daughter Erin Zhu, who was 14 years old at the time. At the time, Erin Zhu had been cut off from contact with anyone outside the home. Her mother was away undergoing medical treatment in China. While Erin Zhu was isolated and helpless, Min Zhu raped her for a period of four weeks, until his wife returned to California in September of 1988.

27. Erin Zhu testified about these events under oath in 2003. Min Zhu was afforded multiple opportunities to deny her testimony, but he has never disputed it. In early 2000, Erin Zhu successfully pursued a claim against her father, Min Zhu, for childhood sexual abuse. Erin Zhu settled her claim against Min Zhu on confidential terms.

Zeleny Becomes Aware of Min Zhu's Conduct

28. Zeleny became aware of Min Zhu's monstrous conduct when he developed a personal and professional relationship with Erin Zhu from the early 1990s to 2000. During the time that Erin Zhu and Zeleny were involved, romantically and in business, Erin Zhu told Zeleny about the horrific abuse she suffered at the hands of her father, Min Zhu.

29. Erin Zhu also told Zeleny about posts she had made on the Usenet newsgroup alt.sexual.abuse.recovery in 1991 and 1992. Erin Zhu's posts corroborated what she had told Zeleny. The posts can be found at: <https://groups.google.com/forum/?hl=en#!search/>

[erin\\$20zhu\\$20sexual\\$20abuse/](#)

30. Erin Zhu also testified about these events under oath in deposition. Her deposition testimony can be found at: <https://youtu.be/QgmWMGG3qgE/>.

31. Erin Zhu requested that Zeleny help her pursue claims against her father for childhood sexual abuse. Zeleny is informed and believes, and on that basis alleges, that Min Zhu paid Erin Zhu a substantial sum of money as part of a confidential settlement to resolve her claims in April 2000.

NEA's Support of Min Zhu Despite Knowledge of the Allegations of His Conduct

32. NEA provided venture capital support to WebEx from its early stages, through and beyond its initial public offering in 2000.

33. NEA continued to do business with Min Zhu through 2005, when Zeleny began his public protests. On May 2, 2005, during a WebEx Experience conference in San Francisco, Zeleny protested against the coverup of Min Zhu's rape of his daughter. The next day, WebEx cancelled its conference. It never held another user conference.

34. According to *Breaking News*, posted on ConferencingNews.com on May 3, 2005, WebEx shut down its user conference in response to Zeleny's protest outside the Westin St. Francis in San Francisco the day before. The archived posting reporting this event can be found at <https://web.archive.org/web/20050507090846/http://www.conferencingnews.com/breakingnews/11>.

35. A week later, this report was corroborated by another conference attendee, who stated "that the conference was cancelled because a protestor with guns was outside the event and was consequently arrested Monday night." The archived posting of this attendee's report can be found at <http://web.archive.org/web/20070225101509/conferblog.com/public/item/91268>.

36. On May 13, 2005, after failing to get a restraining order against future protests by Zeleny, WebEx announced Min Zhu's sudden "retirement" and his relocation to China. The archived posting of this document can be found at <https://web.archive.org/web/>

1 [20051109144958/http://www.webex.com:80/pr/pr340.html](http://www.webex.com:80/pr/pr340.html). Zeleny is informed and believes, and
 2 on that basis alleges, that the management of WebEx encouraged Min Zhu to “retire” as a result of
 3 Zeleny’s public disclosure of Min Zhu’s heinous conduct.

4 37. On September 23, 2005, *Private Equity Week* announced the formation of
 5 Northern Light, a venture capital fund co-founded in China by Min Zhu, in partnership with Scott
 6 Sandell of NEA. In commenting on this announcement on the same day, *China Venture News*
 7 reported: “What’s missing in the *PrivateEquityOnline* article or any NEA release is any mention of
 8 the previous controversy surrounding NEA’s venture partner, Min Zhu, who joined NEA in 2004,
 9 after his forced resignation as WebEx President and Director.” The archived posting of this report
 10 can be found at [https://web.archive.org/web/20110314194905/http://www.chinaventurenews.com/](https://web.archive.org/web/20110314194905/http://www.chinaventurenews.com/50226711/nea_invests_in_china_vc_firm_northern_light.php)
 11 [50226711/nea_invests_in_china_vc_firm_northern_light.php](https://web.archive.org/web/20110314194905/http://www.chinaventurenews.com/50226711/nea_invests_in_china_vc_firm_northern_light.php).

12 38. Following Min Zhu’s departure from WebEx and his flight from the United
 13 States, Zeleny emailed various senior management of NEA to put them and NEA on direct,
 14 personal notice of Min Zhu’s abuse of Erin Zhu.

15 39. NEA refused to disavow Min Zhu. Zeleny is informed and believes, and on
 16 that basis alleges, that NEA has continued to do business with Min Zhu, who is now ensconced in
 17 the Peoples’ Republic of China. In particular, C. Richard “Dick” Kramlich, a former Chairman
 18 and Co-Founder of NEA, moved to Shanghai in January 2008 to collaborate with Min Zhu, long
 19 after Zeleny brought the facts of Min Zhu’s sexual depravity to the attention of NEA. See the
 20 report published in *San Francisco Business Times* on June 29, 2008, at

21 <https://www.bizjournals.com/sanfrancisco/stories/2008/06/30/focus1.html?page=all>. Zeleny is
 22 informed and believes, and on that basis alleges, that NEA has sought to suppress media reports
 23 concerning the causes and circumstances of Min Zhu’s departure from WebEx and the United
 24 States.

25 **Zeleny’s Protests Against Min Zhu and His Enablers**

26 40. Because of the foregoing, Zeleny believed that Min Zhu was categorically
 27 unfit to serve as an officer of a publicly traded company. Zeleny also believed that anyone who
 28

1 would do business with Min Zhu despite knowledge of Min Zhu's monstrous conduct was
2 similarly unfit for any position involving the public trust.

3 41. Between 2005 and 2012, Zeleny conducted a series of public protests.
4 Initially, Zeleny's protests were directed only against Min Zhu. Zeleny later broadened his
5 protests after NEA senior management refused to acknowledge or address Erin Zhu's claims. He
6 expanded his protests to include the officers and directors of WebEx and investors in WebEx who
7 had knowledge of Min Zhu's conduct, yet willingly continued to do business with him, including
8 NEA and certain of its senior management such as Scott Sandell and Dick Kramlich. Zeleny's
9 public protests were intended to expose Min Zhu's conduct and the moral bankruptcy of Min
10 Zhu's cohorts for condoning it.

11 42. The protests have taken the form of in-person demonstrations, musical
12 performances, and multimedia posts on YouTube as well as Zeleny's Internet-based LiveJournal
13 blog, at <http://larvatus.livejournal.com/tag/webex>.

14 43. Zeleny's protests were intended to be provocative. They included flyers and
15 posters containing graphic but non-obscene images reflecting Min Zhu's conduct. They also
16 included flyers and posters calling out specific individuals, including WebEx's Chief Executive
17 Officer Subrah Iyar and NEA's Scott Sandell and Dick Kramlich, for being enablers of Min Zhu.
18 To draw attention to Zeleny's message, some of Zeleny's protests involved music played on
19 accordions, trumpets, and bagpipes, and offers of free food to sex workers, registered sex
20 offenders, and adult industry performers.

21 44. Zeleny made video recordings of his demonstrations and posted them on the
22 Internet. He created a website, www.subrah.com, summarizing the contents of these protest
23 activities. On the website, Zeleny states that executives who raped family members and their
24 knowing enablers have no place in positions of public trust.

25 45. In a further effort to draw attention to his First Amendment protests, Zeleny
26 eventually moved to lawfully exercising his Second Amendment rights, openly carrying and
27 displaying unloaded weapons in compliance with state law.
28

46. Zeleny always notified public officials and peace officers in advance of his plans for demonstrations. He always complied with any peace officer's request to inspect his weapons. Zeleny complied with all time, place, or manner restrictions on his protests requested by the City authorities, even when he believed that such restrictions were unlawful.

47. Zeleny's exercise of his Second Amendment rights has been part and parcel of his exercise of his First Amendment right to protest against Min Zhu and Min Zhu's cohorts. By incorporating a display of unloaded weapons, Zeleny intended to dramatize his protests, attract attention to them, and amplify his message.

The Attempts to Stifle Zeleny's Protests

48. Min Zhu and his cohorts have persistently tried to stifle Zeleny's protests.

49. In 2005, WebEx unsuccessfully sued Zeleny over truthful posts he made on the Yahoo! message board pertaining to WebEx. The case was styled *WebEx Communications, Inc. v. Zeleny*, Santa Clara County Superior Court Case No. 104CV024062, later Los Angeles County Superior Court Case No. BC324927. WebEx was eventually made to pay over \$16,000 in attorney's fees and sanctions to Zeleny, first for filing in an improper venue, and subsequently after its complaint was stricken under California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute.

50. When WebEx was unsuccessful in its efforts to silence Zeleny through civil litigation, it then enlisted law enforcement to attempt to silence him on its behalf.

51. On May 2, 2005, Zeleny began a campaign of street protests against WebEx and Min Zhu at a WebEx user conference at the Westin St. Francis hotel in San Francisco. Zeleny also protested against Subrah Iyar, another co-founder of WebEx and its CEO, and against Scott Sandell, a venture capitalist with NEA who had funded WebEx.

52. Zeleny's protest was peaceful. He did not threaten anyone or brandish any weapons. He did not use abusive language. Zeleny stood peacefully in front of the hotel, in a business suit, holding a two-foot by three-foot board, and distributing flyers.

53. WebEx nevertheless called the San Francisco Police Department and had Zeleny arrested. Because the arrest was unlawful, later that same day, May 2, 2005, the San Francisco Police department released Zeleny without charges.

54. He resumed his protest the following morning, May 3, 2005. WebEx then abruptly canceled its user conference. Ten days later, Min Zhu resigned from WebEx and left the United States for China.

55. In October 2009 and September 2010, Zeleny conducted protests in front of NEA's headquarters in Menlo Park to protest its ongoing support of Min Zhu.

56. On October 5, 2010, NEA filed an application for a temporary restraining order to prevent Zeleny from continuing his protests outside NEA's offices in a case captioned *NEA v. Zeleny*, San Mateo County Superior Court Case No. CIV499465. The court summarily rejected NEA's TRO application. According to NEA's filing, NEA's Scott Sandell had similarly made an application in 2009 for a restraining order against Zeleny, but it had likewise been rejected. Sandell never even notified Zeleny about that earlier application, and the court rejected it without receiving any opposition from Zeleny.

57. Zeleny moved his next series of protests, which commenced in June 2012, to the sidewalk in front of the property housing NEA's headquarters.

Participation of Law Enforcement in the Attempts to Stifle Zeleny's Protests

58. Some of Zeleny's protests took place near NEA's headquarters within the city limits of Menlo Park.

59. The Menlo Park Police Department placed restrictions on the place and manner of Zeleny's protests, limiting the reach and effectiveness of Zeleny's message, and threatened Zeleny with criminal prosecution if he did not acquiesce. The restrictions increased steadily over time.

60. Zeleny is informed and believes, and on that basis alleges, that NEA called in political favors in 2012 to have Zeleny prosecuted under California's firearm laws in an effort to stifle Zeleny's protests.

1 61. On July 19, 2012, the District Attorney for the County of San Mateo, State
2 of California, filed charges of carrying a concealed firearm against Zeleny, in *People v. Zeleny*,
3 San Mateo County Superior Court Case No. SM382036. At that time, the California Penal Code
4 did not prohibit open carrying of an unloaded firearm, so long as it was secured and locked.

5 62. The incident in question was one of Zeleny's public protests, in which he
6 openly displayed the supposedly "concealed" firearm, unloaded and padlocked in a belt holster
7 conspicuously located on his hip. Zeleny fully complied with all pertinent California statutes
8 regulating concealed and open carry of firearms in effect at the time.

9 63. In the course of the prosecution of Zeleny, NEA's representatives monitored
10 his trial, and met frequently with San Mateo County Deputy District Attorney Jenna Johansson.
11 Ms. Johansson regularly referred to NEA as "her client" or "the client," and indicated that she
12 represented both the State of California and NEA.

13 64. Zeleny was tried in a bench trial in the fall of 2014. The Court acquitted
14 him of all charges on December 5, 2014.

15 **California Adopts "Open Carry" Restrictions for Handguns and Non-Handgun Firearms**

16 65. Prior to January 1, 2012, it was legal to openly carry an unloaded firearm in
17 public in California. On October 10, 2011, Governor Brown signed a bill that modified the law on
18 openly carrying an unloaded handgun to match the existing restrictions for openly carrying a
19 loaded weapon.

20 66. California Penal Code section 26350 now prohibits the open carrying of an
21 unloaded handgun, outside of a vehicle, in public, in an incorporated city or city and county.

22 67. Section 26375 exempts from section 26350, "the open carrying of an
23 unloaded handgun by an authorized participant in . . . a motion picture, television or video
24 production, or entertainment event, when the participant lawfully uses the handgun as part of that
25 production or event."

26 68. A year later, in 2012, California adopted similar restrictions on open carry
27 of firearms other than handguns. Penal Code section 26400, which became effective on January 1,
28 2013, makes it a crime for a person to "carry[] an unloaded firearm that is not a handgun in an

1 incorporated city or city and county when that person carries upon his or her person an unloaded
2 firearm that is not a handgun outside a vehicle while in the incorporated city or city and county.”

3 69. Section 26405(r) contains a similar exemption for “an authorized participant
4 in, or an authorized employee or agent of a supplier of firearms for, a motion picture, television, or
5 video production or entertainment event, when the participant lawfully uses that firearm as part of
6 that production or event.”

7 70. Section 25510 contains a similar exemption from sanctions under Section
8 25400 for carrying a concealed firearm for “an authorized participant in a motion picture,
9 television, or video production, or an entertainment event, when the participant lawfully uses the
10 firearm as part of that production or event, or while going directly to, or coming directly from, that
11 production or event.”

12 **Zeleny’s Efforts to Engage in Protected First and Second Amendment Activity**

13 71. Since the enactment of Penal Code sections 26350 and 26400, Zeleny has
14 attempted to continue his peaceful protests as part of a video production, exercising his rights
15 under sections 25510, 26375, and 26405 to film his protests, and then distributing the videos
16 online.

17 72. Zeleny’s protests are part of a rich history of peaceful, but armed, protests,
18 many drawing inspiration from the Black Panthers. Protests of this nature are common across the
19 country in states that have not completely banned the open carry of unloaded firearms. The
20 conspicuous bearing of loaded and unloaded arms in connection with a public or political issue is
21 an effective form of political speech and public demonstration.

22 73. Zeleny’s protests are protected activity under both the First and Second
23 Amendments to the United States Constitution.

24 74. The First Amendment protects non-verbal forms of communication as well
25 as verbal speech. Zeleny’s protests, which combine pure speech, flyers, signs, posters, video, and
26 the peaceful carrying of unloaded firearms, are constitutionally protected activity.

27 75. Zeleny is equally entitled to the benefit of sections 25510, 26375, and 26405
28 of the Penal Code as would be a large movie studio or production company. “Liberty of the press

1 is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of
 2 the large metropolitan publisher who utilizes the latest photocomposition methods.” *Branzburg v.*
 3 *Hayes*, 408 U.S. 665, 704 (1972). While Zeleny was not engaged in the production of feature
 4 films intended for national and international distribution, he did create his video content for the
 5 purpose of publishing it on the Internet, in connection with a matter of significant public interest.

6 76. Zeleny’s right to openly carry unloaded firearms is also protected by the
 7 Second Amendment. The right to bear arms enshrined in the Second Amendment includes the
 8 right to “wear, bear, or carry . . . upon the person or in the clothing or in a pocket for the purpose
 9 of being armed and ready . . . in case of conflict with another person.” *District of Columbia v.*
 10 *Heller*, 554 U.S. 570, 584 (2008). The motivating principle of the Second Amendment is self-
 11 defense. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

12 77. The First and Second Amendment are made applicable to municipalities
 13 pursuant to the Due Process Clause of the Fourteenth Amendment.

14 78. The Defendants, however, acting under color of law and in their official
 15 capacities, have either suppressed or threatened to suppress Plaintiff’s lawful exercise of his
 16 Constitutional rights pursuant to official policies, customs, or practices. The Defendants interpret
 17 certain California statutes in such a way that Plaintiff’s protests are completely foreclosed by
 18 California’s prohibition on the carriage of exposed firearms.

19 **The City Threatens Further Prosecution in an Effort to Chill Zeleny’s Protected Speech**

20 79. Local law enforcement, invoking the power of the State of California,
 21 continues to threaten Zeleny with further prosecution if he resumes his protests. They have
 22 candidly confirmed that their threatened prosecution is based in part on the content of Zeleny’s
 23 message, which they find to be offensive.

24 80. Between June 2015 and the present, Zeleny has attempted to exercise his
 25 rights under sections 25510, 26375, and 26405 by engaging in videotaped protests while carrying
 26 unloaded firearms, including handguns and rifles.

1 81. Contrary to the plain language of the Penal Code, however, the City has
2 interpreted it to require authorization from the City both for the video production itself, and for the
3 carrying of unloaded firearms as part of that production.

4 82. Shortly after the adoption of section 26405, the City adopted a municipal
5 policy, which purportedly requires a Special Event Permit for Zeleny's protests, giving the City's
6 Special Event Permit Committee/Community Services Director broad discretionary authority to
7 approve or deny permits for video productions involving firearms.

8 83. The City informed Zeleny that if he engages in his protests without a permit
9 under its Special Event Permit policy, he will be prosecuted for violation of California's open
10 and/or concealed carry laws, including California Penal Code §§ 25400, 26400, and 26350.

11 84. In an effort to comply with the City's requirements, between 2015 and
12 present, Zeleny has repeatedly applied to the City for entertainment permits accommodating his
13 videotaped, armed protests. Despite his offers to accommodate all reasonable time, place, and
14 manner restrictions on his proposed events, the City has denied all of Zeleny's applications
15 without explanations, while expressly declining to formulate conditions for approval.

16 85. Zeleny has repeatedly requested that the City identify the conditions or
17 criteria Zeleny must satisfy to receive a permit, and the City has failed and refused to do so.

18 86. During an appeal of one of Zeleny's requests for a permit, City officials
19 testified that they had denied Zeleny's requests, among other reasons, because they found the
20 content of his protests offensive. Plaintiff is informed and believes, and on that basis alleges, that
21 the City has continually denied Zeleny's requests for permits because it disagrees with the
22 substance of his message, and does not believe that his statement about Min Zhu's conduct or
23 WebEx's and NEA's tacit approval of that conduct are true.

24 87. The requirement that Zeleny obtain a permit, and refusal to approve
25 Zeleny's permit requests under any circumstances, is an unlawful, content-based restriction on
26 Zeleny's speech protected by the First Amendment. Plaintiff is informed and believes, and on that
27 basis alleges, that the content-based refusal to approve Zeleny's requests for permits was
28 undertaken pursuant to an official policy, custom, or practice of the City.

95. California Penal Code sections 26350 and 26400, on their face, prohibit Zeleny from exercising his right to carry firearms in peaceful protest. Zeleny seeks a declaration that these statutes are unconstitutional on their face, as applied to Zeleny's display of unloaded firearms as a means of protest.

96. California Penal Code sections 25510, 26375, and 26405 allow "authorized participants" in video productions to carry unloaded firearms in connection with such productions. On their face, these statutes permit Zeleny to carry unloaded firearms in filmed protests as part of a video production. The City has taken the position, however, that City approval is required both of the video production itself and of the "authorized participants" allowed to carry firearms.

97. The City has required the issuance of film permits to Zeleny as a condition of recognizing his statutory and Constitutional right to lawfully carry unloaded firearms as part of his videographed public entertainment events protesting ongoing municipal and corporate sponsorship of an incestuous child rapist. Zeleny contends that he does not need the City's permission or approval to do so, and that the City has refused its permission and approval as an unlawful content-based restraint on his right to free speech. A declaration is necessary that the City's policy requiring such approval is unconstitutional, or that the City cannot condition approval on the content of the video production or entertainment event.

98. The City has prohibited Zeleny from exercising his right to free speech based on the content of his protests. A declaration is necessary that Zeleny's protests and the materials used by him in those protests are not obscene as a matter of law, and do not violate California Penal Code section 313.1(a), or in the alternative, that section 313.1(a) is unconstitutional as applied to Zeleny's protesting activities.

FIRST COUNT

(Violation of the First Amendment to the United States Constitution)

(Against Defendants the City of Menlo Park and Bertini)

99. Plaintiff incorporates by reference all allegations in each of the preceding paragraphs, as if fully set forth herein.

108. The City has applied its misinterpretation of California law to give the City unfettered discretion to refuse permits for a motion picture, television or video production, or entertainment event, and participants in said production or event, including based on impermissible factors, such as the content of the production or event.

109. Plaintiff is informed and believes, and on that basis alleges, that the City has distinguished between commercial motion picture, television or video production, or entertainment events, and independent political productions, film and video productions of protests, and film and video productions involving matters of public concern.

110. As a result of the City's misinterpretation and misapplication of the California Penal Code, the City has refused to recognize the exceptions to California's firearms carry bans, California Penal Code §§ 25510, 26375, and 26405, as applicable to authorized participants in a motion picture, television or video production, or entertainment event, as applying to Zeleny.

111. Plaintiff seeks a declaration as follows:

a. That California Penal Code §§ 25510, 26375, and 26405 do not require the City's approval of the motion picture, television or video production, or entertainment event involved, or the use of firearms or the authorized participants in that production or event.

b. That the City's policies and practices regarding permits for motion picture, television or video production, or entertainment event are unconstitutional as applied to Zeleny.

THIRD COUNT

(Violation of the First and Second Amendments to the United States Constitution)

(Against Defendants the City of Menlo Park and Bertini)

112. Plaintiff incorporates by reference all allegations in each of the preceding paragraphs, as if fully set forth herein.

113. The First and Second Amendments to the United States Constitution are made applicable to the City through the Due Process Clause of the Fourteenth Amendment.

1 114. Menlo Park's Special Event Permit and Film Permit policies violate the
2 First and Second Amendments to the United States Constitution, either facially, or as applied to
3 Zeleny's peaceful protests.

4 115. The City has misinterpreted California Penal Code §§ 25510, 26375, and
5 26405 as giving the City the right, not only to approve motion picture, television or video
6 productions, or entertainment events within City limits pursuant to customary permitting, but also
7 to approve the individual participants in those productions or events who may lawfully use
8 unloaded firearms. As a result, the City has asserted that it has the ability, on threat of criminal
9 prosecution, to prohibit the lawful use of firearms in video productions as a result of non-
10 compliance with City rules relating to motion picture, television or video production, or
11 entertainment event permits.

12 116. Pursuant to its unlawful construction of §§ 25510, 26375, and 26405, the
13 City has adopted a municipal policy that gives it unfettered discretion to prohibit protected First
14 Amendment and Second Amendment activity, including on the grounds that the City does not
15 approve of the content or message conveyed by that activity.

16 117. The City's Special Event Permit and Film Permit policies violate the First
17 and Second Amendments of the United States Constitution on their face in that they allow the City
18 to wholly prohibit the exercise of rights to free speech and to bear arms, or to condition the
19 exercise of those rights on improper factors.

20 118. Plaintiff is informed and believes, and on that basis alleges, that the City
21 has imposed no definite standards on its Special Event Permit and Film Permit decisions, nor any
22 limitation on the time period within which such permits must be approved, thus arrogating
23 unbridled discretion on behalf of its permitting officials in violation of the First Amendment.

24 119. The City's Special Event Permit and Film Permit policies are void as
25 unconstitutionally vague, in that the prohibitive terms are not clearly defined such that a person or
26 ordinary intelligence can readily identify the applicable standard for inclusion and exclusion. The
27 requirements impose no restrictions on the discretion of City officials to deny permits arbitrarily,
28 capriciously, or based on unlawful factors, such as the content of protected speech.

120. In the alternative, the City's Special Event Permit and Film Permit policies violate the First and Second Amendments as applied to Zeleny, because the City has enforced their provisions to bar Zeleny's peaceful film and video productions and entertainment events, which comply with California state law, due to the content of his productions and events. This amounts to an unlawful, content-based prior restraint on Zeleny's protected speech activity.

121. The City has also applied its Special Event Permit and Film Permit requirements in such a way that it amounts to an outright prohibition against Zeleny bearing arms within City limits.

122. Plaintiff seeks a declaration as follows:

a. That Penal Code §§ 25510, 26375, and 26405 do not require the approval by a municipality in order for a person to be an "authorized participant" in a motion picture, television or video production, or entertainment event, exempted from California's prohibition on carrying unloaded firearms.

b. That the City's Special Event Permit and Film Permit requirements are unconstitutional under the First and Second Amendments to the United States Constitution on its face, as improper restrictions of the rights to free speech and to bear arms.

c. In the alternative, that the City's Special Event Permit and Film Permit requirements, as applied to bar Zeleny's peaceful entertainment events and film productions, amounts to an unlawful prior restraint on Zeleny's First Amendment right to free speech, and an unlawful restriction on his Second Amendment right to bear arms.

FOURTH COUNT

(Violation of 42 U.S.C. § 1983)

(Against Defendants the City of Menlo Park and Bertini)

123. Plaintiff incorporates by reference all allegations in each of the preceding paragraphs, as if fully set forth herein.

124. The City, through Bertini and other employees and agents, has violated Zeleny's constitutional rights under the First, Second, and Fourteenth Amendments to the United States Constitution, under color of state law, pursuant to official policies, customs, and practices.

1 125. The City has imposed unlawful prior restraints on Zeleny's protected speech
 2 activity by requiring him to unnecessarily seek permits to engage in constitutionally protected
 3 activity, and by refusing to grant any such permits based on the content of Zeleny's speech.
 4 Forbidding Plaintiff to exercise his right to free speech does not bear any relationship to protecting
 5 the public health, safety, or welfare.

6 126. The City and Bertini have violated Zeleny's rights to engage in protected
 7 speech by threatening him with criminal prosecution for engaging in protected activity, including
 8 threatening criminal prosecution based on the content of Zeleny's speech and his peaceful use of
 9 unloaded firearms as part of that speech.

10 127. The City and Bertini have violated Zeleny's right to bear arms by
 11 threatening him with criminal prosecution for exercising his Second Amendment right to
 12 peacefully bear unloaded firearms, in compliance with state law, and through enforcement of
 13 unconstitutional laws.

14 128. Defendants' true purpose was and is to silence the viewpoint expressed by
 15 Zeleny's speech and his mode of expression. Consequently, Defendants true purpose was and is to
 16 silence disfavored viewpoints in violation of the Free Speech Clause of the First Amendment.

17 129. As a direct and proximate result of Defendants' violation of the Free Speech
 18 Clause of the First Amendment and the Second Amendment, Plaintiff has suffered irreparable
 19 harm, including the loss of his constitutional rights, entitling him to declaratory and injunctive
 20 relief, and the reasonable costs of this lawsuit, including his reasonable attorneys' fees.

21 **FIFTH COUNT**

22 **(Violation of the Fourteenth Amendment to the United States Constitution)**

23 **(Against Defendants Becerra and Brown)**

24 130. Plaintiff incorporates by reference all allegations in each of the preceding
 25 paragraphs, as if fully set forth herein.

26 131. The government bears the burden of justifying restrictions on the exercise of
 27 fundamental rights by a particular class or classes of individuals.
 28

1 138. During these meetings and communications, the City agreed to use its
2 authority under state law to restrict, limit, and ultimately stop Zeleny's protests, and to stop him
3 from lawfully carrying unloaded firearms within the City limits. NEA agreed, either tacitly or
4 explicitly, to assist the City in its efforts to hamper and end Zeleny's protests and lawful carrying
5 of firearms. Internal City documents reflect that as early as 2010, the City was devoted to
6 developing a "firm solution" to end Zeleny's protests of NEA altogether.

7 139. NEA took overt acts in pursuit of this unlawful conspiracy, including:

8 a. Engaging in years-long surveillance of Zeleny both online and in-
9 person surveillance of Zeleny with the City's approval and encouragement, and sharing
10 information with the City that could be used potentially to halt Zeleny's protests. This
11 surveillance included, among other things, tracking Zeleny's online activities and physically
12 following him. NEA transmitted the results of this surveillance to the City, including, among
13 other information (a) NEA notified Bertini that Zeleny's mother had passed away in Los Angeles
14 (Zeleny is unaware how NEA learned this personal information); (b) NEA falsely accused Zeleny
15 of using drugs, which the City believed it could use to seize Zeleny's firearms; (c) NEA regularly
16 reported to the City about Zeleny's whereabouts; and (d) NEA followed Zeleny's online activity
17 and reported information to the City that it believed useful in prosecuting Zeleny or ending his
18 protests.

19 b. Attending a number of meetings with City personnel to address
20 Zeleny's protests. On information and belief, the purpose of these meetings was to find a "firm
21 solution" to stop Zeleny from protesting NEA. On information and belief, NEA and the City used
22 these meetings to develop a combined strategy to combat Zeleny's protests, which involved falsely
23 prosecuting Zeleny for carrying a concealed firearm, and using California's "open carry" ban to
24 prevent him from continuing to protest.

25 c. Representatives of the City gave NEA direct access to police
26 officials, including their private cell phone numbers, and encouraged NEA representatives to
27 contact police officials directly any time Zeleny appeared near NEA's offices, which NEA did.
28

d. Participating in a series of meetings and other communications regarding Zeleny's "Special Events" permit application for the purpose of developing a "combined response" to Zeleny's protests. During these communications, the City gave NEA advanced notice that it intended to deny Zeleny's permits, but would nonetheless request more information from him only to ultimately deny the application. On information and belief, during these meetings, the City and NEA agreed and developed a plan to continue to deny Zeleny's permit applications at each stage of the appeal process.

140. The City and Bertini also engaged in overt acts in furtherance of the conspiracy, at the behest of NEA, as alleged above. Among other things:

a. Contrary to written policy, and despite acknowledging that Zeleny had not violated any laws and was at all times cooperative with police, the City maintained a surveillance file on Zeleny based solely on his protesting activity. Bertini referred to this as his "Zeleny file." The file contained information about Zeleny's whereabouts, his living situation, his activities, and potential criminal laws that the City could use to stop Zeleny's protests. Both officers and NEA representatives gathered information on Zeleny to keep in Bertini's "Zeleny file."

b. Bertini unilaterally (and without basis) designated Zeleny as a "security risk," and used this as a basis to monitor and harass Zeleny and his supporters. Among other things, City police officers repeatedly interviewed Zeleny and his supporters without probable cause or reasonable suspicion of a crime, initiated "informational" police reports on Zeleny and his supporters, followed Zeleny and his supporters in marked and unmarked police cars in violation of written policy, engaged in "enforcement stops" of the sole purpose of questioning Zeleny's supporters about their affiliation with Zeleny. City police officers also routinely stood by to watch Zeleny's protests and interviewed Zeleny and his supporters about inappropriate topics in violation of written City policy.

c. Bertini and one or more subordinates referred Zeleny for prosecution for carrying a concealed weapon without legal basis in direct violation of California law, resulting in Zeleny's complete acquittal. Among other things, the City claimed in the same case that Zeleny

1 was guilty of unlawfully carrying an unconcealed firearm and also that he was guilty of unlawfully
 2 carrying a concealed firearm based on the same conduct. During this prosecution, City officers
 3 failed to disclose exculpatory material to Zeleny or his attorneys. This prosecution resulted in a
 4 complete acquittal.

5 d. The City submitted information about Zeleny to a legislative
 6 committee in an effort to have the open carrying of rifles prohibited in California in violation of
 7 the Second Amendment.

8 e. After Zeleny's prosecution was over, the City police department,
 9 including Bertini personally, took charge of processing Zeleny's "special events" and film permit
 10 applications and denied those applications without basis on content-based grounds. Bertini was
 11 not the person responsible for handling either type of application within the City, but nonetheless
 12 participated directly with the City Attorney in denying the permit applications on content-based
 13 grounds in violation of Zeleny's rights under the First and Second Amendment.

14 141. This conspiracy, and the acts of defendants NEA, the City, and Bertini, in
 15 furtherance of the conspiracy, injured Zeleny by preventing him from exercising his First and
 16 Second Amendment rights as alleged herein.

17 **SEVENTH COUNT**

18 **(Conspiracy to Violate Civil Rights in violation of 42 U.S.C. § 1985)**

19 **(Against Defendant NEA)**

20 142. Plaintiff repeats and re-alleges each of the foregoing allegations as though
 21 fully set forth herein.

22 143. As set forth above, NEA, the City, and Bertini engaged in a conspiracy to
 23 prevent Zeleny from protesting in violation of his First and Second Amendment Rights.

24 144. The purpose of that conspiracy was to deprive Zeleny of equal protection of
 25 the laws, or of equal privileges and immunities, by preventing him from exercising his rights of
 26 free speech and to bear arms based on the content of his protests and his engaging in protected
 27 First Amendment activity.

28

1 145. Each of NEA, the City, and Bertini engaged in overt acts in furtherance of
2 the conspiracy as alleged above.

3 146. The conspiracy, and defendants NEA, the City, and Bertini's conduct in
4 furtherance of the conspiracy, injured Zeleny and deprived him of his First and Second
5 Amendment rights as alleged herein.

6
7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff sues for relief as set forth below:

9 A. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all
10 Defendants, that California Penal Code §§ 26400 and 26350 are unconstitutional;

11 B. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all
12 Defendants, that California Penal Code §§ 25510, 26375, and 26405 do not require municipal
13 approval of "authorized participants" in an entertainment event or film or video production, and
14 that Zeleny is legally permitted to carry unloaded firearms in connection with his entertainment
15 events and/or his film or video productions, without the need for City approval, subject to
16 compliance with other applicable laws;

17 C. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all
18 Defendants, that Zeleny's peaceful carrying of unloaded firearms in the course of his speech on
19 matters of public concern or matters of political, social, or other concerns to the community or
20 issues of significant importance to the public as a whole, is constitutionally protected; in the
21 alternative, enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all Defendants,
22 that Zeleny's peaceful carrying of unloaded firearms in the course of his entertainment events
23 and/or his film or video productions, is constitutionally protected;

24 D. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on the
25 City and Bertini, that Zeleny's speech activity concerning the child rape cover-up by the Zhush and
26 their associates is constitutionally protected and not obscene or "obscene as to minors" within the
27 meaning of the California Penal Code, and that their public display would not violate Penal Code
28 §§ 311.2, 313.1 (a), and 313.4, in virtue of its serious literary, artistic, political, and social value;

1 E. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that the City of
 2 Menlo Park's Special Event Permit requirement is unconstitutional on its face, or in the
 3 alternative, as applied to Zeleny's protests;

4 F. Enter an injunction against Defendants prohibiting them from enforcing
 5 Penal Code §§ 26400 and 26350 against Zeleny in connection with his peaceful protests, from
 6 enforcing the City of Menlo Park's Special Event Permit requirement, and from refusing to grant
 7 Zeleny required permits based on the content of his speech activity;

8 G. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, construing
 9 California Penal Code §§ 25510, 26405, and 26375 and enter a declaratory judgment stating that
 10 these sections exempt from sanctions under California Penal Code §§ 25400, 26400, and 26350 for
 11 the carrying of an unloaded handgun and of an unloaded firearm that is not a handgun, *any*
 12 *individual* who acts and/or holds himself out as an authorized participant in, or serves as an
 13 authorized employee or agent of a supplier of firearms for, a motion picture, television or video
 14 production, or entertainment event, when the participant lawfully uses that firearm as part of that
 15 production or event, as part of rehearsing or practicing for participation in that production or event,
 16 or while the participant or authorized employee or agent is at that production or event, or rehearsal
 17 or practice for that production or event. Relevant actions and representations include, without
 18 limitation, displaying ornamental signs or multimedia artworks; reciting slogans, speeches, or
 19 poetry; playing trumpets, accordions, bagpipes, or other musical instruments; and/or wearing
 20 conspicuous costumes, makeup, wigs, clown noses, or other decorative prostheses;

21 H. Award nominal damages against Defendant NEA and punitive damages in
 22 an amount to be proven at trial.

23 I. Award attorneys fees pursuant to 42 U.S.C. § 1988 and California Code of
 24 Civil Procedure § 1021.5, and costs as provided by law; and

25 J. Award such other and further relief as the Court deems just and proper.

26 Dated: April 9, 2019

Affeld Grivakes LLP

27
 28 s/ David W. Affeld

David W. Affeld

Attorneys for Defendant Michael Zeleny

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all matters so triable. Dated:

Dated: April 9, 2019

Affeld Grivakes LLP

s/ David W. Affeld

David W. Affeld

Attorneys for Plaintiff Michael Zeleny

PROOF OF SERVICE

I hereby certify that on April 9, 2019, I electronically filed the foregoing document using the Court's CM/ECF system. I am informed and believe that the CM/ECF system will send a notice of electronic filing to the interested parties.

/s/ _____ Gabrielle Bruckner _____

Gabrielle Bruckner